PD-0589-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 1/21/2020 9:12 AM
Accepted 1/22/2020 9:52 AM
DEANA WILLIAMSON
CLERK

PD – 0589-19

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

AUSTIN, TEXAS

FILED
COURT OF CRIMINAL APPEALS
1/22/2020
DEANA WILLIAMSON, CLERK

PEDRO HERNANDEZ, JR.,	§	
Appellant	§	
	§	**CAUSE NO. 11-17-00129-CR**
V.	§	
	§	**TRIAL COURT NO. 6888**
THE STATE OF TEXAS,	§	
Appellee	§	

APPELLANT'S BRIEF ON THE MERITS PURSUANT TO PETITIONER'S DISCRETIONARY REVIEW FROM THE ELEVENTH COURT OF APPEALS AT EASTLAND, TEXAS

CHIEF JUSTICE JOHN BAILEY, Presiding

COPELAND LAW FIRM
Tim Copeland
State Bar No. 04801500
Erika Copeland
State Bar No. 16075250
PO Box 399
Cedar Park, TX 78613
Phone: 512-897-8196
Email: tcopeland14@yahoo.com
ecopeland63@yahoo.com

APPELLANT REQUESTS ORAL ARGUMENT

TABLE OF CONTENTS AND INDEX OF AUTHORITIES

Table of Contents

Table of Contents, continued

Table of Contents, continued

Index of Authorities

Authorities **Page**

United States Supreme Court cases

Texas Court of Criminal Appeals cases

Index of Authorities, continued

Authorities **Page**

Texas Court of Criminal Appeals cases, continued

Index of Authorities, continued

PD – 0589-19

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

AUSTIN, TEXAS

PEDRO HERNANDEZ, JR.,	§	
Appellant	§	
	§	**CAUSE NO. 11-17-00129-CR**
V.	§	
	§	**TRIAL COURT NO. 6888**
THE STATE OF TEXAS,	§	
Appellee	§	

APPELLANT'S BRIEF ON THE MERITS

TO THE HONORABLE COURT OF APPEALS:

1. IDENTITY OF PARTIES, COUNSEL, and TRIAL COURT

COMES NOW, Pedro Hernandez, Jr., appellant, who would show the Court that interested parties herein are as follows:

PEDRO HERNANDEZ, JR., appellant, TDCJ No. 02135763, Allred Unit, 2101 FM 369 North, Iowa Park, Texas 76367.

BYRON HATCHETT, trial attorney for appellant, PO Box 3374, Abilene, Texas 79604.

TIM COPELAND, appellate attorney for appellant, PO Box 399, Cedar Park, Texas 76813.

MIKE FOUTS, Haskell County District Attorney, PO Box 193, Haskell, Texas 79521, trial and appellate attorney for appellee, the State of Texas.

HON. SHANE HADAWAY, Judge, 39th District Court, Haskell, Texas.

STACEY M. SOULE, State Prosecuting Attorney, P.O. Box 13046 Austin, TX 78711-3046

.

PD – 0589-19

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

AUSTIN, TEXAS

PEDRO HERNANDEZ, JR.,	§	
Appellant	§	
	§	**CAUSE NO. 11-17-00129-CR**
	§	
	§	
V.	§	
	§	**TRIAL COURT NO. 6888**
THE STATE OF TEXAS,	§	
Appellee	§	

APPELLANT'S BRIEF ON THE MERITS

---

2. STATEMENT OF THE CASE

On February 23, 2017, Pedro Hernandez, Jr. was convicted by a Haskell County jury of burglary of a habitation. (C.R. 1, pp. 3-5). After preparation of a presentence investigative report and his plea of "true" to two enhancement paragraphs, the trial court assessed a 50-year prison sentence. (R.R. 5, p. 49). From that judgment and sentence, Hernandez gave due notice of appeal. (C.R. 1, p. 153). On May 16, 2019, the Eleventh Court of Appeals at Eastland affirmed the conviction

in an unpublished opinion, ***Hernandez v. State***, at 2019 WL 2147703 (Tex. App. – Eastland May 16, 2019) (mem. op.) (*not designated for pub*.) (Opinion attached in Appendix 1). This Court granted Mr. Hernandez's pro se petition for discretionary review on November 20, 2019. His brief is due on or before January 22, 2020.

3. STATEMENT REGARDING ORAL ARGUMENT

Appellate counsel believes that oral argument would aid the Court in reaching its decision and, therefore, counsel requests such oral argument.

4. ISSUE PRESENTED

The evidence is insufficient to support Hernandez' conviction for burglarizing Brian Amos' home because there is no evidence that he intended to or that he did commit theft of a cell phone owned by Brian Amos.

5. STATEMENT OF FACTS

Briefly, and drawing mainly from those cited by the Eleventh Court of Appeals as the basis for its opinion, the facts proven during trial show the following:

On the morning of the alleged offense, Chief Chris Mendoza of the Munday Police Department received information that Hernandez was in front of a local business. Chief Mendoza, along with another Munday police officer, went to the local business and questioned Hernandez about his purpose for being there. Appellant told Chief Mendoza, among other things, that he needed a ride to the Rochester/Rule area because "he and his girlfriend got in a fight" and he thought that "someone was going to come beat him up." Chief Mendoza agreed to give Hernandez a ride, but he clarified that he could only drive him to Knox City. At trial, Chief Mendoza testified that Hernandez seemed scared and confused during their conversation. He told Mendoza someone was following him. (R.R. 3, pp. 25-29).

Chief Mendoza dropped Hernandez off in Knox City with an officer from the Knox County Sheriff's Department, Chief Deputy Jose Rojo. Chief Deputy Rojo drove Appellant to Rochester. Chief Deputy Rojo testified that, during the drive, Hernandez was "incoherent" and acting paranoid. Hernandez, Rojo testified, was

concerned that "people … were going to kill him." (R.R 3, pp. 34-36). Chief Deputy Rojo dropped Hernandez off at a residence where Hernandez used to live. Hernandez immediately ran from Chief Deputy Rojo's vehicle up to the home. When Hernandez entered the home, he brandished a knife and knocked over various pieces of furniture and personal property to barricade the door. The residents of the home instructed Hernandez to leave. Hernandez then jumped through a window and fled to another home nearby, which was occupied by Brian Keith Amos and his two daughters, Brittany and Tyreonna Amos. (R.R. 3, pp. 92-96).

Tyreonna was outside the home at the time Hernandez approached. He ran up to Tyreonna and told her that "someone was shooting at him" and asked if he could come inside and use her cell phone. (R.R. 4, pp. 40-41). Tyreonna told him that she needed to ask her father first. When she tried to enter her home through the back door, it was locked, so Hernandez broke down the door, and both he and Tyreonna entered. Brian Amos testified that he did not give Hernandez permission to enter his home. He also said that when Hernandez entered his home, he wrestled him to the floor and restrained him. Amos said that Hernandez kept repeating that someone was after him and that he needed to call police. (R.R. 3, pp. 43-45). According to Amos, Appellant begged to be let go "because they're after [him]."

Amos testified that Appellant told him: "If you can just let me make a call, I can get somebody to come and I can leave." Finally, after repeated requests to use a phone, Amos told his daughter to let Hernandez use her cell phone. (R.R. 3, p. 43). Amos testified that she handed Hernandez the cell phone, and Hernandez called 9-1-1. At some point after the call, Hernandez "bolted out the door," jumped over the fence, and ran to another home nearby. (R.R. 3, p. 45). Although Amos had told a police dispatcher that Hernandez had "busted" through his door, Amos testified at trial that he had instead opened the door to allow Hernandez to leave. In any event, Hernandez ran off with Amos' cell phone; neither Amos nor anyone in his family gave him consent to take the cell phone.

Hernandez broke into the neighbor's home by jumping through a plate glass window into the living room – cutting himself badly in the process. (R.R. 3, pp. 46-47). When Chief Deputy Kenny Barnett of the Haskell County Sheriff's Department arrived on scene, Hernandez exited that home, approached Chief Deputy Barnett, and told him that "people were after him." Chief Deputy Barnett described Hernandez as hysterical and covered in blood. He said that he believed that Hernandez was under the influence of a controlled substance. (R.R. 3, pp. 75-77).

Deputy Christopher Keith of the Haskell County Sheriff's Department also arrived on scene. He searched the most recent home that Hernandez had broken into. Deputy Keith found Amos' cell phone lying on an air conditioner outside a window that he believed Hernandez had broken through. None of the witnesses observed anyone following Hernandez, but Chief Deputy Barnett testified that, in his opinion, Hernandez "actually believed somebody was after him." (R.R. 3, pp. 81-82).

6. SUMMARY OF THE ARGUMENT

There was legally insufficient evidence that Hernandez intended to or did commit a theft of a cell phone when he crashed into a victim's house seeking refuge from imagined enemies. The owner of the cell phone in question voluntarily allowed Hernandez to use the phone to place calls and did not restrict his use of it. That Hernandez was taken into custody by law enforcement officers minutes after the cell phone's owner allowed its use and the phone was not returned to its rightful owner immediately after its use does not negate the fact that Hernandez did not appropriate the phone without permission, intending to deprive its rightful owner of its return.

7. COURT OF APPEALS OPINION

The Court of Appeals held there was sufficient evidence to support appellant's conviction for burglary of a habitation. The Court reasoned that from the evidence the jury could have concluded that Hernandez took a cell phone without the owner's consent; that his flight from Amos' house was consistent with someone who knew they were not authorized to take the phone; that the fact he did not return the phone indicated an inference he intended to keep the phone. Thus, the Court concluded, a rational jury could have found beyond a reasonable doubt that Hernandez committed theft and, in turn, burglary of a habitation. (*Slip op.* at 6-7).

8. ARGUMENT

In his single issue, Hernandez challenges the sufficiency of the evidence that he intended to or that he did commit theft in the course of burglary of a habitation.

Standard of Review

Legal sufficiency is the constitutional minimum required by the Due Process Clause of the **Fourteenth Amendment** to sustain a criminal conviction. See ***Jackson v. Virginia***, 443 U.S. 307, 315-16, 99 S. Ct. 2781, 2786-87, 61 L.Ed.2d 560 (1979); *see* also ***Brooks v. State***, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (plurality op.). When reviewing the sufficiency of the evidence, legal or factual, an

appellate court views all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See* ***Jackson***, 443 U.S. at 320, 99 S. Ct. at 2789; ***Brooks***, 323 S.W.3d at 899. Under this standard, a reviewing court defers to the trier of fact's responsibility to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from basic facts to ultimate facts. ***Jackson***, 443 U.S.at 319, 99 S. Ct. at 2789; ***Brooks***, 323 S.W.3d at 899. Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. ***Hooper v. State***, 214 S.W.9, 13 (Tex. Crim. App. 2007). The duty of a reviewing court is to ensure that the evidence presented actually supports a conclusion that the defendant committed a crime. *See* ***Williams v. State***, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. ***Malik v. State***, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997); ***Gollihar v. State***, 46 S.W.3d 243 (Tex. Crim. App. 2001). Such a charge is one that accurately sets out the law, is authorized by the indictment, and does not necessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the

particular offense for which the defendant was tried. ***Malik***, 953 S.W.2d at 240. Evidence is insufficient under this standard in four circumstances: (1) the record contains no evidence probative of an element of the offense; (2) the record contains a mere "modicum" of evidence probative of an element of the offense; (3) the evidence conclusively establishes a reasonable doubt; or (4) the acts alleged do not constitute the criminal offense charged. ***Gonzales v. State***, 337 S.W.3d 473, 478 (Tex. App. – Houston [1st Dist.] 2011, *pet. ref'd*). If an appellant court finds the evidence insufficient under this standard, it must reverse the judgment and enter an order of acquittal. ***Gonzales***, 337 S.W.3d at 479.

Applicable Law

Under Texas law, a person can be found guilty of burglarizing a habitation if it is proven that he entered a habitation without the effective consent of the owner with the intent to commit a felony, a theft, or an assault, or if he attempts to commit those offenses. *See* **TEX. PENAL CODE § 30.02(a)(3) (West 2019)**. The elements of burglary of a habitation are as follows: (1) a person, (2) intentionally or knowingly, (3) enters a habitation, (4) without the effective consent of the owner, and (5) commits or attempts to commit a felony, theft, or assault. ***Id***.; ***Davila v. State***, 547 S.W.2d 606, 608 (Tex. Crim. App. 1977); *see* ***Rivera v. State***, 808 S.W.2d

80, 92 (Tex. Crim. App. 1991) (State is not required to prove that Appellant intended to commit theft when he entered the habitation). Here, Hernandez only contests the sufficiency of the evidence with respect to the fifth element. A theft is committed when a person "unlawfully appropriates property with intent to deprive the owner of property." **TEX. PENAL CODE § 31.03(a)**. Appropriation of property is unlawful if committed without the owner's effective consent. ***Id***. **§ 31.03(b)(1)**; *see* ***id***. **§ 31.01(4)(B)** ("appropriate" means "to acquire or otherwise exercise control over property other than real property"). Appropriation of property is "without the owner's effective consent" if it is without his "assent in fact." ***Id.* § 31.03(b)(1), §1.07(a)(11) West Supp. 2018)**; ***Thomas v. State***, 753 S.W.2d 688, 691-92 (Tex. Crim. App. 1988). "[A]ssent in fact" can be express or apparent. **TEX. PENAL CODE § 1.07(a)(11);** ***Baird v. State***, 398 S.W.3d 220, 229 (Tex. Crim. App. 2013).

Analysis

Reiterating his argument from his original appellate brief, here Hernandez does not claim he did not enter another's home. Neither does he argue that his

obvious intoxication precludes finding the requisite intent necessary to commit burglary as the law seems well settled in that regard. *See, e.g.,* ***Ramos v. State***, 547 S.W.2d 33 (Tex. Crim. App. 1977) and **TEX. PENAL CODE § 8.04(a) (West 2019)**. Rather, the evidence here adduced simply does not show that when Hernandez entered another's home, he did so with the specific intent to commit theft as alleged in his burglary indictment. *See* ***LaPoint v. State***, 750 S.W.2d 180 (Tex. Crim. App. 1986) (Nothing in our burglary statute or other statutes indicate that a presumption from the evidence arises with regard to proof of intent as an essential element of burglary). And, while intent, as a question of fact for the jury, may be inferred from the surrounding circumstances as a basis to support a jury's verdict, reasonable inferences must nevertheless be supported by the evidence presented at trial. ***Couthren v. State***, 571 S.W.3d 786 (Tex. Crim. App. 2019); ***Tate v. State***, 500 S.W.3d 410, 413 (Tex. Crim. App. 2016)(citation omitted)("The jury is the sole judge of credibility and weight to be attached to the testimony of the witnesses, and juries may draw multiple reasonable inferences from the facts so long as each is supported by the evidence presented at trial. The jury is not, however, allowed to draw conclusions based on speculation.").

The Court of Appeals' opinion concedes that Hernandez was given permission to use Amos' daughter's phone and even to take the phone with him outside the home. Evidence of his inferential intent to steal the phone thereafter is most notably shown, the Court contends, in his "flight from the residence" which the Court concludes is "consistent with someone who knew they were not authorized to take the property." (*Slip. Op*. at 6). Similar "inferences" supporting the jury's conclusions are cited by the Court of Appeals in its decision when it talks about Hernandez's break-ins at other homes. Respectfully, however, what the Court of Appeals does not really address in its opinion is Hernandez's rather unusual *modus operandi* if he is, in fact, a burglar – *modus operandi* that suggests something else was going on with Hernandez that day besides an intent to steal a cell phone.

The record reveals that when Deputy Barnett took Hernandez into custody at the McGhee's home after he ran from the Amos house, Hernandez had unlawfully entered three homes that morning – the Sandoval's, the Amos' and, finally, the McGhee's. He had left all three homes in shambles, but there was no evidence that he took *anything* from any of the homes to indicate an intent to steal from any of them, save the lone cell phone he failed to return to Amos and which the Court of Appeals found so damning. (Only the McGhees were away from home when

Hernandez entered the houses.) His "method" of entry into the so-called "burgled" homes was, to say the least, unorthodox for a burglar. He crashed into and through doors as well as one plate glass window without regard to injury to himself. Neither did it seem to matter whether the homes were even occupied at the time. He did not have any "tools" of the burglar's trade on him when arrested. And, were his intent to burgle a home, he was guilty of extremely poor planning as he had no means of escape from any of the homes he entered. He was without a car or anywhere to go with stolen property, and, when he was taken into custody, he had no means with which to carry off any loot that he did steal. In fact, his only means of transportation throughout the day had been provided by law enforcement officers. Finally, it is a strange burglar indeed who breaks into three homes in broad daylight before witnesses – in an apparent attempt to steal a cell phone from a resident after he asks permission to use it.

In sum, Hernandez does not argue that a jury may not generally infer guilt from the circumstances presented. Rather, he would argue that in *this* case the "combined and cumulative force of all the evidence, when viewed in the light most favorable to the verdict" simply does not support the jury's determination. Rather, the jury's verdict reflects a conclusion based on speculation as to what Hernandez

intended in these circumstances – if it could be said he intended anything at all. A close reading of the record causes one to wonder what in the world was going through Hernandez' mind in the midst of his mini-rampages. It is pure speculation to assume that his actions were focused on the theft of a cell phone.

9. PRAYER

WHEREFORE, in light of the foregoing, Pedro Hernandez, Jr. prays that this Honorable Court reverse and render this cause for failure to offer sufficient evidence to support the jury's verdict and for such other and further relief to which he may show himself justly entitled.

COPELAND LAW FIRM
P.O. Box 399
Cedar Park, TX 78613
Phone: 512.897.8196
Fax: 512.215.8114
Email: tcopeland14@yahoo.com

By: /s/ Tim Copeland
Tim Copeland
State Bar No. 04801500
Attorney for Appellant

10. CERTIFICATE OF SERVICE AND OF COMPLIANCE WITH RULE 9

This is to certify that on January 21, 2020, a true and correct copy of the above and foregoing document was served on the following in accordance with the *Texas Rules of Appellate Procedure*, and that the Appellant's Brief on the Merits is in

compliance with Rule 9 of the *Texas Rules of Appellate Procedure* and that portion which must be included under Rule 9.4(i)l) contains 2761 words:

Pedro Hernandez, Jr.
TDCJ No. 02135763
Allred Unit
2101 FM 369 North
Iowa Park, TX 76367

Stacey M. Soule
State Prosecuting Attorney
P.O. Box 13046
Austin, TX 78711-3046

Mike Fouts, District Attorney
P.O. Box 193
Haskell, TX 79521

/s/ Tim Copeland
Tim Copeland

APPENDIX

Opinion filed May 16, 2019

In The

Eleventh Court of Appeals

No. 11-17-00129-CR

PEDRO HERNANDEZ JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 39th District Court
Haskell County, Texas
Trial Court Cause No. 6888

M E M O R A N D U M O P I N I O N

Appellant, Pedro Hernandez Jr., appeals his conviction for the second-degree felony offense of burglary of a habitation. In two issues on appeal, Appellant argues that the evidence was insufficient to convict him of burglary of a habitation. We affirm.

Background Facts

On the morning of the alleged offense, Chief Chris Mendoza of the Munday Police Department received information that Appellant was in front of a local

business. Chief Mendoza, along with another Munday police officer, went to the local business and questioned Appellant about his purpose for being there. Appellant told Chief Mendoza, among other things, that he needed a ride to the Rochester/Rule area because "he and his girlfriend got in a fight" and he thought that "someone was going to come beat him up." Chief Mendoza agreed to give Appellant a ride, but he clarified that he could only drive Appellant to Knox City. At trial, Chief Mendoza testified that Appellant seemed confused during their conversation.

Chief Mendoza dropped Appellant off in Knox City with an officer from the Knox County Sheriff's Department, Chief Deputy Jose Rojo. Chief Deputy Rojo drove Appellant to Rochester. Chief Deputy Rojo testified that, during the drive, Appellant was "incoherent" and was concerned that "people . . . were going to kill him." Chief Deputy Rojo dropped Appellant off at a residence where Appellant used to live. Appellant immediately ran from Chief Deputy Rojo's vehicle up to the home.

When Appellant entered the home, Appellant brandished a knife and knocked over various pieces of furniture and personal property. The residents of the home instructed Appellant to leave. Appellant jumped through a window and fled to another home nearby, which was occupied by Brian Keith Amos and his two daughters, Brittany and Tyreonna Amos.

Tyreonna was outside the home at the time Appellant approached. Appellant ran up to Tyreonna and told her that "someone was shooting at him" and asked if he could come inside. Tyreonna told Appellant that she needed to ask her father first. When she tried to enter her home through the back door, it was locked, so Appellant broke down the door and both he and Tyreonna entered. Brian testified that he did not give Appellant permission to enter his home.

Brian, upon Appellant's entrance to the home, wrestled Appellant to the floor and restrained him. Brittany called 9-1-1 on Brian's cell phone. Brian held Appellant for twenty-five to thirty minutes as they waited for the police. According to Brian, Appellant asked to be let go "because they're after [him]." Brian testified that Appellant told him: "If you can just let me make a call, I can get somebody to come and I can leave."

Brian permitted Appellant to make a phone call. Brian testified that Brittany handed Appellant the cell phone. Appellant called 9-1-1. At some point after the call, Appellant "bolted out the door," ran into the fence, jumped over the fence, and ran to another home nearby. Although Brian had told a police dispatcher that Appellant had "busted" through his door, Brian testified at trial that he had instead opened the door to allow Appellant to leave. In any event, Appellant ran off with Brian's cell phone; neither Brian nor anyone in his family gave Appellant consent to take his cell phone.

Appellant broke into another home. When Chief Deputy Kenny Barnett of the Haskell County Sheriff's Department arrived on scene, Appellant exited that home, approached Chief Deputy Barnett, and told him that "people were after him." Chief Deputy Barnett described Appellant as hysterical and believed that Appellant was under the influence of a controlled substance. Deputy Christopher Keith of the Haskell County Sheriff's Department also arrived on scene. He searched the most recent home that Appellant had broken into. Deputy Keith found Brian's cell phone outside a window that he believed Appellant had broken through.

None of the witnesses observed anyone following Appellant. Chief Deputy Barnett testified that, in his opinion, Appellant "actually believed somebody was after him."

After the jury heard the evidence, it found Appellant guilty of burglary of a habitation. The trial court assessed punishment and sentenced Appellant to

confinement for fifty years in the Institutional Division of the Texas Department of Criminal Justice. This appeal followed.

Analysis

In two issues, Appellant challenges the sufficiency of the evidence supporting his conviction for burglary of a habitation. In his first issue, Appellant argues that the evidence is insufficient to support his conviction because there was no evidence that he intended to, or that he did, commit theft of Brian's cell phone. In his second issue, he claims that the trial court erred when it denied his motion for directed verdict because the evidence was insufficient to prove that he intended to, or that he did, commit theft of Brian's cell phone.

We review a challenge to the trial court's denial of a motion for a directed verdict as a challenge to the sufficiency of the evidence. *See Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996). The standard of review for sufficiency of the evidence is whether any rational trier of fact could have found Appellant guilty beyond a reasonable doubt of the charged offense. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *see also Fernandez v. State*, 479 S.W.3d 835, 837–38 (Tex. Crim. App. 2016). We review the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). The trier of fact may believe all, some, or none of a witness's testimony because the trier of fact is the sole judge of the weight and credibility of the witnesses. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986); *Isham v. State*, 258 S.W.3d 244, 248 (Tex. App.—Eastland 2008, pet. ref'd). We defer to the trier of fact's resolution of any conflicting inferences raised by the evidence and presume that the trier of fact resolved such conflicts in favor of the verdict. *Jackson*, 443 U.S. at 326; *Zuniga v. State*, 551 S.W.3d 729, 733–34 (Tex.

Crim. App. 2018); *Brooks*, 323 S.W.3d at 899; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

Appellant was charged by indictment with burglary of a habitation. TEX. PENAL CODE ANN. § 30.02(a)(3) (West 2019). The indictment stated that Appellant "did then and there, intentionally or knowingly enter a habitation without the effective consent of Brian Amos, the owner thereof, and attempted to commit or committed theft of property, to-wit: a cell phone, owned by Brian Amos."

As relevant in this case, the elements of burglary of a habitation are as follows: (1) a person, (2) intentionally or knowingly, (3) enters a habitation, (4) without the effective consent of the owner, and (5) commits or attempts to commit a felony, theft, or assault. *Id.*; *Davila v. State*, 547 S.W.2d 606, 608 (Tex. Crim. App. 1977); *see Rivera v. State*, 808 S.W.2d 80, 92 (Tex. Crim. App. 1991) (State is not required to prove that Appellant intended to commit theft when he entered the habitation). Appellant only contests the sufficiency of the evidence with respect to the fifth element.

A theft is committed when a person "unlawfully appropriates property with intent to deprive the owner of property." PENAL § 31.03(a). Appropriation of property is unlawful if committed without the owner's effective consent. *Id.* § 31.03(b)(1); *see id.* § 31.01(4)(B) ("appropriate" means "to acquire or otherwise exercise control over property other than real property"). Appropriation of property is "without the owner's effective consent" if it is without his "assent in fact." *Id.* § 31.03(b)(1), § 1.07(a)(11) (West Supp 2018); *Thomas v. State*, 753 S.W.2d 688, 691–92 (Tex. Crim. App. 1988). "[A]ssent in fact" can be express or apparent. PENAL § 1.07(a)(11); *Baird v. State*, 398 S.W.3d 220, 229 (Tex. Crim. App. 2013).

Appellant argues that there is no evidence showing that he unlawfully appropriated Brian's cell phone with the intent to deprive him of it. Although Appellant admits that he took the phone, he contends that the taking was inadvertent.

He claims that proof he did not intend to deprive Brian of the cell phone is found in the following facts: he mistakenly thought people were chasing him; Brian allowed him to stand up and opened the door for him to leave; he surrendered to the police shortly after he ran from Brian's home (before he was able to return the cell phone); and he did not steal any other property. We disagree.

Appellant forcefully entered Brian's home. Brian testified that he did not give Appellant consent to enter, so he restrained Appellant. Then, after Appellant asked to "make a call," Brittany gave Appellant Brian's cell phone, and Brian allowed Appellant to make the call. However, Appellant did not just make a phone call: he fled with Brian's cell phone. Brian testified that neither he nor anyone in his family authorized Appellant to take his cell phone.

From this evidence, the jury could have concluded that Appellant took Brian's cell phone without Brian's effective consent. *See Mueshler v. State*, 178 S.W.3d 151, 156 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd); *see also Northup v. State*, No. 13-07-00581-CR, 2009 WL 1623426, at *6 (Tex. App.—Corpus Christi June 11, 2009, pet. ref'd) (mem. op., not designated for publication). Lack of effective consent may be shown by circumstantial evidence. *Wells v. State*, 608 S.W.2d 200 (Tex. Crim. App. [Panel Op.] 1980). Although Brittany and/or Brian gave Appellant consent to use the cell phone for a phone call, they did not give Appellant consent to take the cell phone off the property. And while no one expressly told Appellant any specific restrictions on his use of the cell phone, the circumstances are such that a jury could have inferred that Appellant knew he was only allowed to use the cell phone for a limited purpose. His behavior, most notably his flight from the residence, is consistent with someone who knew they were not authorized to take the property. *See Mueshler*, 178 S.W.3d at 156. Therefore, a jury could have inferred that Appellant unlawfully appropriated Brian's cell phone.

The jury also could have inferred that Appellant intended to deprive Brian of his cell phone. *See Northup*, 2009 WL 1623426, at *6. Appellant's intent to deprive may be inferred from his words, acts, and conduct. *Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002) (citing *Manrique v. State*, 994 S.W.2d 640, 649 (Tex. Crim. App. 1999)). The fact that Appellant did not return the cell phone after he took it is evidence from which a jury could have inferred Appellant's intent to deprive. *See Rowland v. State*, 744 S.W.2d 610, 613 (Tex. Crim. App. 1988). Moreover, even though Appellant did not maintain possession of the cell phone, this does not mean that he did not intend to deprive Brian of the cell phone. *See Griffin v. State*, 614 S.W.2d 155, 159 (Tex. Crim. App. 1981); *Banks v. State*, 471 S.W.2d 811, 812 (Tex. Crim. App. 1971). The jury could have inferred that, when Appellant fled with Brian's cell phone, he intended to keep the cell phone permanently but accidentally dropped it as he was breaking into the third home. *See* PENAL § 31.01(2) (defining "deprive"). Indeed, the jury could have inferred that Appellant intended to pick the cell phone back up but was interrupted by the arrival of the police. While the jury could have also believed that Appellant inadvertently took the cell phone, the jury did not believe that version of events, and we must defer to the jury's resolution of conflicting inferences. *See* TEX. CODE CRIM. PROC. ANN. art. 38.04 (West 1979); *Zuniga*, 551 S.W.3d at 733–34.

Viewing the evidence in the light most favorable to the verdict, a rational jury could have found beyond a reasonable doubt that Appellant committed theft. Therefore, we hold that there was sufficient evidence to support Appellant's conviction for burglary of a habitation. We overrule Appellant's first and second issues.

`This Court's Ruling

We affirm the judgment of the trial court.

KEITH STRETCHER

JUSTICE

May 16, 2019

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.[1]

Willson, J., not participating.

[1]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.